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Access to Tax InJustice

Francine J. Lipman*

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* William S. Boyd Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law. This article is dedicated to the memory of Christine Ann Brunswick, Executive Director of the American Bar Association, Section of Taxation, and 2013 recipient of the Section’s Distinguished Service Award. Christine was an extraordinary advocate for tax justice whose leadership profoundly increased access to pro bono tax services across America. This article is part of Pepperdine Law Review’s January 18, 2013 Tax Advice for the Second Obama Administration symposium, co-sponsored by Tax Analysts.
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> “Justice in the life and conduct of the State is possible only as first it resides in the hearts and souls of the citizens.”

**Plato**

### I. PRELUDE TO INJUSTICE

Every morning, Monday through Friday, school children across the United States raise their voices in unison and pledge allegiance to America, with liberty and justice for all. America, in turn, pledges to these children and the world that it is a nation of liberty, justice, and laws. Laws drafted

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3. **Id.** see also Letter from John Adams to William Tudor (Dec. 18, 1816), in IX WORKS OF JOHN ADAMS, at 207 (Charles Francis Adams ed., 1856); Remarks at the National Archives and Records Administration, 2009 bk. I PUB. PAPERS 689, 690 (May 21, 2009) (President Barack Obama stated: “The documents we hold in this very hall, the Declaration of Independence, the Constitution, the Bill of Rights, these are not simply words written into aging parchment. They are the foundation of liberty and justice in this country and a light that shines for all who seek freedom, fairness, equality, and dignity around the world.”). **See generally** PETER CHARLES HOFFER, A NATION OF LAWS: AMERICA’S IMPERFECT PURSUIT OF JUSTICE (2010).
by representatives intended to follow through on America’s promise of liberty and justice for all.

A. America: The Land of Social InJustice?

Yet for more than 16 million of these children and 30 million adults living in poverty, America does not deliver on its promise of justice. In a recent global study, America ranked 27th out of 31 countries in social justice. Social justice was evaluated by looking at six key factors: poverty prevention, access to education, labor market inclusion, social cohesion and non-discrimination, health, and “intergenerational justice.”

1. Economic Injustice in America

Prevention of poverty is a fundamental precondition for social justice. Under conditions of poverty, engagement in and access to basic education, labor, and health care services are demonstrably curtailed. The causes of poverty are numerous, interrelated, and complex. Nevertheless, poverty

4. U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE IN THE UNITED STATES: 2011—TABLES & FIGURES tbl. 3: People in Poverty by Selected Characteristics, available at http://www.census.gov/hhes/www/poverty/data/incpovhlth/2011/table3.pdf [hereinafter CENSUS, 2011 INCOME, POVERTY, AND HEALTH INSURANCE] (last visited Feb. 6, 2013). These figures are for the year 2011. Notably, the 2011 poverty data is not statistically different than the 2010 data. The demographic profile of the poor in America is: white (more than 19 million out of more than 46 million), native born (more than 38 million), female (almost 26 million), Southern (18 million), and between the ages of 18 and 64 (more than 26 million). Id. Nevertheless, people of color, noncitizens, unemployed adults, urban dwellers, and children are disproportionately represented. Id.

5. For purposes of the study, “social justice” was defined as “guaranteeing each individual genuinely equal opportunities for self-realization through the targeted investment in the development of individual ‘capabilities.’” BERTELSMANN STIFTUNG, SOCIAL JUSTICE IN THE OECD—HOW DO THE MEMBER STATES COMPARE? SUSTAINABLE GOVERNANCE INDICATORS 11 (2011).

It is important to note that the concept of social justice employed here emphasizes less the principle of equality per se than it does the principle of individual freedom, which can be exercised only when the state and a society establish the most level playing field possible for the pursuit of life chances. Id. at 11 n.3 (citation omitted).

6. Id. at 14

7. Today many ghetto residents have almost no contact with mainstream American society or the normal job market. As a result, they have developed distinctive and often dysfunctional social norms. The work ethic, investment in the future and deferred gratification make no sense in an environment in which legitimate employment at a living wage is impossible to find and crime is an everyday hazard (and temptation). Richard Thompson Ford, Why the Poor Stay Poor, N.Y. TIMES, Mar. 8, 2009, at BR8 (reviewing WILLIAM JULIUS WILSON, MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY (2009)).
reflects the consequences of national policies in fundamental societal arenas including education, labor, immigration, welfare, and taxation.

America receives particularly low scores in the area of poverty prevention. The study describes poverty in America as “alarming” and ranks the United States twenty-ninth out of thirty-one countries in poverty prevention, above only Mexico and Chile.\(^8\) The study concludes that “income poverty” afflicts 17.3% of all Americans, including 22.2% of the elderly (ranked twenty-fifth of thirty-one countries in elder poverty prevention) and 21.6% of children (ranked twenty-eighth of thirty-one countries in child poverty prevention).\(^9\)

From the perspective of social justice, prevention of childhood poverty is paramount because of the profound way in which it undermines the goal of establishing greater equality of life in the present and future. A society that deprives its youngest members of the opportunity to participate in foundational societal programs is self-defeating. Childhood poverty critically damages a country’s most vulnerable members and valuable assets, fundamentally undermining its potential and progress.\(^10\)

2. Childhood Poverty in America

More than 32 million children, or almost 45% of all children, including 11 million children, or almost one-half of children under six, lived in conditions that did not support basic living expenses in 2010.\(^11\) And this is not the worst of the economic injustices suffered by our children. In one of the richest countries in the world, more than 7 million children, or almost 10%, including almost 3 million children under the age of seven, live in extreme poverty.\(^12\)

“Among rich countries, the U.S. is exceptional’ . . . . ‘We are

\(^{8}\) [STIFTUNG, supra note 5, at 14.]

\(^{9}\) Id.

\(^{10}\) Id.; see also Charles M. Blow, America’s Exploding Pipe Dream, N.Y. TIMES, Oct. 29, 2011, at A21.

We have not taken care of the least among us. We have allowed a revolting level of income inequality to develop. We have watched as millions of our fellow countrymen have fallen into poverty. And we have done a poor job of educating our children and now threaten to leave them a country that is a shell of its former self. We should be ashamed.”

\(^{11}\) [TAYLOR ROBBINS, SHANNON STAGMAN & SHEILA SMITH, NAT’L CTR. FOR CHILDREN IN POVERTY, YOUNG CHILDREN AT RISK: NATIONAL AND STATE PREVALENCE OF RISK FACTORS 2 (2012); see CENSUS, 2011 INCOME, POVERTY AND HEALTH INSURANCE, supra note 4, at tbl. 5: People with Income Below Specified Ratios of Their Poverty Thresholds By Selected Characteristics: 2011.]

\(^{12}\) “Extreme poverty” is defined for this purpose as 50% of the applicable poverty threshold. CENSUS, 2011 INCOME, POVERTY AND HEALTH INSURANCE, supra note 4, at tbl. 5.
exceptional in our tolerance of poverty.’’13 A recent study from Wider Opportunities for Women found that 45% of all individuals residing in America (including 55% of all children) live in households that lack economic security.14 The majority of American children are living in or on the precipice of poverty. This social injustice puts them and the future of our entire country in grave and unconscionable danger of irreversible and unspeakable economic and social harm.15

13. Sheldon Danziger, the director of the National Poverty Center at the University of Michigan, responding to a recent UNICEF study. Saki Knafo, U.S. Child Poverty Second Highest Among Developed Nations: Report, HUFFINGTON POST (May 31, 2012, 9:00 PM), http://www.huffingtonpost.com/2012/05/30/us-child-poverty-report-unicef_n_1555533.html. Danziger further explained that while Canada and America have the same relative child poverty rate—25.1—after government taxes, benefits and other social programs, Canada’s child poverty rate drops to 13.1, and America’s barely budge. “Basically, other countries do more,” he said. “They tend to have minimum wages that are higher than ours. The children would be covered universally by health insurance. Other countries provide more child care.” Id.; see also UNICEF, MEASURING CHILDHOOD POVERTY (2012), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&cad=rja&ved=0CEoQFjAA&url=http%3A%2F%2Fwww.unicef-irc.org%2Fpublications%2Fpdf%2Frec10_eng.pdf&ei=9SheUZjKDMHKigKi0oCQBQ&usg=AFQjCNGF59LVpXk4hJEgZbh0ML7-huw&sig2=1p_l_rRsVt15MJo06_2CJ&bvm=bv.44770516,d.cGE.

14. “Economic security” is “defined as the ability to pay for basic needs like food, transportation and medical care, while setting aside a modest amount of money for emergency and retirement savings.” Francine J. Lipman, Pro Bono Matters: Still Fighting the War on Poverty, 31 ABA TAX SECTION NEWS Q., Winter 2012, at 1, 1, available at http://www.americanbar.org/content/dam/aba/administrative/taxation/pdfs/katie-tolliver.authcheckdam.pdf.

B. American Exceptionalism: Tolerance of Poverty?

With more than one-half of our children living in financially vulnerable households, America must make meaningful and significant changes to reduce poverty and save its children and the country’s future.¹⁶

As President Obama said in his December 2012 speech to the families of the twenty first-grade children brutally murdered at Sandy Hood Elementary School, children are our obligation and 100% of our future.

This is our first task: caring for our children. It’s our first job. If we don’t get that right, we don’t get anything right. That’s how, as a society, we will be judged.

And by that measure, can we truly say, as a nation, that we’re meeting our obligations? Can we honestly say that we’re doing enough to keep our children—all of them—safe from harm? Can we claim, as a nation, that we’re all together there, letting them know that they are loved and teaching them to love in return? Can we say that we’re truly doing enough to give all the children of this country the chance they deserve to live out their lives in happiness and with purpose?

I’ve been reflecting on this the last few days, and if we’re honest with ourselves, the answer is no. We’re not doing enough. And we

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¹⁶ Nobel Prize winning economist James Heckman argues that the most crucial investments we as a country can make are in early childhood education, especially for underprivileged poor children. James Heckman, The Heckman Equation Brochure, HECKMAN, http://www.heckmanequation.org/content/resource/heckman-equation-brochure (last visited Apr. 4, 2013); see Nicholas D. Kristof, For Obama’s New Term, Start Here, N.Y. TIMES, Jan. 24, 2013, at A27; see also Robert Greenstein, Letter to the Editor, Invitation to a Dialogue: Fighting Poverty, N.Y. TIMES, Feb. 6, 2013, at A24 (“Too many young children from poor families face diminished opportunities by the time they’re just 2 years old, and we should do more to help them overcome the formidable obstacles before them. . . . [S]afety-net programs now cut the number of poor people nearly in half—by more than 40 million.”).
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will have to change. 17

In America today, a record high number of people live in poverty. 18 A majority of all children are living in financially insecure households. They are our obligation and our future. It is time to turn our focus away from the tax rates of the wealthiest few among us to the well-being of the most vulnerable in our care—those who have no voice, no vote, who garner little media or political attention, and those who, without our assistance, have little hope for any future other than the prison of poverty. 19 And so we turn to Congress’s presently favorite, long-standing vehicle for social benefit policies: the federal income tax system.

II. SOCIAL JUSTICE THROUGH THE FEDERAL INCOME TAX SYSTEM

A. Introduction: IRS as Social Benefit Administrator?

The Internal Revenue Service (IRS) was created to collect taxes imposed by Congress through its plenary taxing power under the Constitution to fund federal spending. Consistent with this purpose, the IRS collects about 96% of all federal receipts 20 and has a current mission to “[p]rovide America’s taxpayers top-quality service by helping them


18. More people are living in poverty in America in 2011 than at any other time in its history. See CENSUS, 2011 INCOME, POVERTY, AND HEALTH INSURANCE, supra note 4, at fig. 4: Number in Poverty and Poverty Rate: 1959 to 2011. However, without the social safety nets the poverty rate would be almost twice as high—dragging an additional 40 million people into its prison of hopelessness. See Robert Greenstein, Commentary: How Effective Is the Safety Net?, CTR. ON BUDGET & POL’Y PRIORITIES (Feb. 6, 2013), http://www.cbpp.org/cms/?fa=view&id=3898.


understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.”

However in more recent years, Congress has increasingly directed the IRS to serve taxpayers by administering billions of dollars of tax-based versus direct spending social benefit programs. Tax-based social benefits take a variety of forms and designs including income exclusions, deductions, rates, and credits. The Congressional Budget Office has estimated that refundable credits in particular will increase by approximately $500 billion over the next ten years. The most significant and long-standing of these credits targeted to working poor families with children is the Earned Income Tax Credit (EITC).

B. Antipoverty Relief Under the Internal Revenue Code: The EITC

1. Introduction

In 1972, during the Nixon Administration, Republican then-Governor Ronald Reagan, testifying before Congress for workfare in lieu of direct government assistance, “suggested that the federal government should exempt low income families from income taxes and give them a rebate for their Social Security taxes.”

Several years later, Senator Russell Long, the conservative Democrat chairman of the Senate Finance Committee, and Congressman Al Ullman, the moderate chairman of the House Ways and Means Committee, packaged the idea in a refundable tax credit and won liberal support for the EITC. Since it was developed and established in 1975 by conservative forces, the EITC was signed into law by President Ford and has enjoyed bipartisan support for almost forty years.


22. LILY BATCHELDER & ERIC TODER, CTR. FOR AM. PROGRESS, GOVERNMENT SPENDING UNDERCOVER: SPENDING PROGRAMS ADMINISTERED BY THE IRS 15 (2010), available at http://www.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/govspendingundercover.pdf (arguing that structuring tax expenditures as refundable tax credits and ensuring that they operate without regard to a claimant’s marginal tax rate can address the problematic tendency of tax expenditures to function as “upside-down subsidies” that provide the greatest benefit to the most well-off taxpayers).


2. EITC Benefits

a. Poverty Prevention for Working Families

The EITC, which is completely administered through the federal income tax system, is the most successful antipoverty program in America for working poor families. The EITC provides annual cash payments reaching more individuals annually than traditional social justice programs.


28. The EITC enjoys significantly higher participation rates than the federal food stamp program, which is administered through traditional direct spending channels: 89% of eligible individuals participate in the EITC, as compared to a 70% participation rate in the food stamp program. See, e.g., Lawrence Zelenak, Tax or Welfare? The Administration of the Earned Income Tax Credit, 52 UCLA L. REV. 1867, 1915 (2005) (“In addition, the participation rate (that is, the percentage of eligible persons who receive benefits) is much higher with the EITC’s self-declared eligibility than with the Food Stamp program’s precertification requirement.”); see David A. Weisbach & Jacob Nussim, Article, The Integration of Tax and Spending Programs, 113 YALE L.J. 955, 1004-05 (2004) (observing that the EITC enjoys significantly higher participation rates than the federal food stamp program); see also Elaine Maag & Adam Carasso, Taxation and the Family: What Is the Earned Income Tax Credit?, TAX POL’Y CENTER, http://taxpolicycenter.org/briefing-book/key-elements/family/eitc.cfm (last updated June 22, 2011). See generally LEONARD E. BURMAN & DEBORAH I. KOBES, TAX POL’Y CTR., TAX FACTS: EITC REACHES MORE ELIGIBLE FAMILIES THAN TANF, FOOD STAMP (2003), available at http://www.urban.org/UploadedPDF/1000467_EITC_reaches.pdf. However, in tax year 2004, eligible taxpayers left an estimated $4.9 billion in EITC “on the table,” not including additional federal and state tax credits. ALAN BERUBE, BROOKINGS INST., USING THE EARNED INCOME TAX CREDIT TO STимULATE LOCAL ECONOMIES (2006) [hereinafter BERUBE, EARNED INCOME TAX CREDIT], available at http://www.brookings.edu/~media/research/files/reports/2006/11/children_families-berube/berube20061101eitc.pdf; see also Marsha Blumenthal et al., Participation and Compliance with the Earned Income Tax Credit, 53 NAT’L TAX J. 189, 207–08 (2005) (suggesting that EITC participation rates might not be as high as reported due to the exclusion from any benefits of non-filers).
The EITC lifts tens of millions of families out of poverty, including several million children each year.\textsuperscript{29} The EITC lifts more children out of poverty than any other government program.\textsuperscript{30} In 2010, more than 3.3 million children and 3 million adults were lifted out of poverty by the EITC.\textsuperscript{31} Without the EITC, the number of children living in poverty would increase by one-third.\textsuperscript{32}

\textit{b. Work Incentive: A Living Wage Safety Net}

The credit, which is directly correlated with annual earnings, was designed to encourage work. “Research strongly confirms that the EITC has played a critical role in bringing more single mothers into the workforce.”\textsuperscript{33} Moreover, the EITC is a “safety net” rather than a “crutch,” as recipients claim the credit temporarily when a job disruption or other significant event reduces their income.\textsuperscript{34} Sixty-one percent of EITC claimants from 1989–2006 claimed benefits for only one or two years at a time.\textsuperscript{35} This same study also indicated that only 20\% of EITC claimants received benefits for more than five consecutive years.\textsuperscript{36} Another study found that over time, EITC recipients as a whole pay far more in federal income taxes (in addition to federal excise, payroll, and state and local sales and property taxes) than they receive in EITC benefits.\textsuperscript{37}

\begin{footnotesize}
\begin{enumerate}
\item[30.] \textit{Wanchek & Greenstein, supra} note 25.
\item[32.] \textit{Id.}
\item[34.] \textit{See Holt, supra} note 33.
\item[35.] \textit{Id.}
\item[36.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
c. Intergenerational Provider of Better Life Opportunities

EITC benefits are far-reaching. Recent research demonstrates that the positive impact of the EITC is intergenerational. Raising a poverty-level family’s income by $3,000 a year (a typical combined EITC and Child Tax Credit benefit) between children’s prenatal year and fifth birthday is associated with a significant increase in children’s adulthood earnings. The study finds a 17% increase in earnings in adulthood, and an average of 135 hours of additional work per year, compared to similar children whose families did not receive the increase in income. Thus, EITC benefits increase family income in the current year and for future generations.

d. Economic Stimulus, Including Job Creation, for Local Economies

With increased income and cash flow, EITC benefits meaningfully stimulate local, state, and national economies. EITC cash payments are significant particularly when compared to recipient’s household income. Working poor families most often spend their EITC benefits within a few months of receipt on basic necessities like housing, utilities, food, transportation, furniture, and basic household appliances. As a result, EITC benefits meaningfully stimulate local economies.

39. Id.
Many local and state communities are increasingly recognizing the enormous economic investment power of the EITC. More funds are invested in communities, especially urban areas, annually through EITC than through many traditional federal spending programs. For example, in 2004 the Community Development Block Grant and HOME programs (which provide cities and states with flexible funds for affordable housing and community economic development) awarded approximately $3.1 billion to nearly 1,000 municipal governments nationwide. Residents in the same areas received and spent in goods and services over $20 billion from the EITC.

Large aggregate sums of EITC dollars claimed provide concentrated cash infusions to local economies, including in some cities more than $1 million per square mile. A study in an Ohio county determined that in the first quarter of 2003, EITC benefits were equal to first quarter wages paid in the local hotel industry. Local spending creates exponential benefits as cash moves from consumers to stores, firms, and their employees and back again. For example, the city of San Antonio, Texas has estimated that each additional $1 in EITC benefits generates $1.58 in local economic activity, and each additional $37,000 of EITC benefits results in an additional permanent job. Another study in Baltimore, Maryland determined that EITC dollars generated nearly $600,000 in local income and property tax revenues.

C. How the EITC Works

The EITC is a refundable tax credit providing cash payments to working families of up to $6,044 (for 2013). While initially designed to offset the burdens of income and payroll taxes, the now enhanced EITC can also provide meaningful wage subsidies for low-income working families. In 2012, approximately 27 million households received average EITC benefits

43. See Berube, Earned Income Tax Credit, supra note 28, at 2.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id. (citing Texas Perspectives, Inc., Increased Participation in the EITC in San Antonio (2003)).
49. Id. (citing Jacob France Inst., The Importance of the Earned Income Tax Credit and Its Economic Effects in Baltimore City (2005)).
of $2,200 or almost $62 billion. More than 90% of EITCs claimed generate cash refunds as opposed to offsetting a federal tax liability.

1. Qualifying for the EITC

The EITC was designed by Congress to encourage low-income families to work. Accordingly, to qualify for the EITC, an individual and her spouse—if she is married—must have earned income within certain lower-earned income ranges. The EITC and the earned income ranges are indexed for inflation annually and vary meaningfully with the number of qualifying children. For eligible individuals with three or more qualifying children, the maximum 2013 EITC is $6,044 for income levels of less than $46,227 ($51,567 for married filing jointly). Because the EITC is also correlated to household size, maximum EITC benefits decrease for eligible individuals with two versus three qualifying children ($5,372 in 2013), one qualifying child ($3,250 in 2013), and most significantly for taxpayers with no qualifying children ($487 in 2013). Married taxpayers, with or without children, who file their tax returns separately, will not receive any EITC although they may have otherwise qualified for thousands of dollars. The EITC is not intended to benefit low wage earners with significant investments so eligible individuals cannot have investment income in excess of $3,300 per year. In addition, Congress does not want to subsidize undocumented immigrants or their families, so every person included on the


55. Id.


tax return must have a Social Security number that authorizes work, whether or not that individual is working.\footnote{I.R.C. § 32(c)(1)(E) (requiring Social Security number qualifying for work for taxpayer and her spouse, if any, and of at least one qualifying child, if any); I.R.C. § 32(c)(3)(D) (requiring Social Security number).}

2. How the EITC Does Not Work: Limits on EITC Tax Justice

Since its enactment, tax and poverty law scholars and economists have deconstructed, analyzed, criticized, lauded, researched, and written in extensive detail about inherent benefits and burdens in the design of the EITC. This scholarship likely has resulted in life-changing amendments including 2009 enhanced EITC benefits for families with three or more children and mitigation of the marriage penalty, which lifted 1.6 million out of poverty in 2010 alone and were extended through the end of 2017 by Congress in early 2013.\footnote{See generally CHARITE, DUTTA-GUPTA & MARR, supra note 31 (describing many studies and papers on the EITC generating a wealth of information on the pervasive impact of the credit on working poor families and their communities).}

Unfortunately, the EITC continues to have design challenges, including most notably, issues related to: 1) complexity; 2) high marginal tax rates in the EITC income phase-out ranges; 3) the marriage penalty; and 4) minimal benefits for childless low-income workers and workers outside of the age range and other statutory requirements (e.g., Social Security number).\footnote{HOLT, AGE 30, supra note 33 (describing many studies and papers on the EITC generating a wealth of information on the pervasive impact of the credit on working poor families and their communities).}

These scholars have made numerous proposals to mitigate these challenges, including modifications to the phase-in and phase-out percentages and income threshold ranges; eligibility requirements as well as more fundamental structural conversions into a work credit plus a family credit or a direct offset against Social Security taxes, plus a wage subsidy.\footnote{HOLT, AGE 30, supra note 33.} While the EITC has been simplified and marriage penalties inherent in the EITC have been reduced, these challenges continue to plague the EITC.\footnote{HOLT, AGE 30, supra note 33.}

Nevertheless, tax scholarship on these EITC challenges is thoughtful, comprehensive, and readily accessible to members of Congress and the Obama Administration.

This essay will attempt to add to existing EITC scholarship by discussing certain challenges low income individuals and their families face

\footnotesize
58. I.R.C. § 32(c)(1)(E) (requiring Social Security number qualifying for work for taxpayer and her spouse, if any, and of at least one qualifying child, if any); I.R.C. § 32(c)(3)(D) (requiring Social Security number).
60. HOLT, AGE 30, supra note 33; see also Francine J. Lipman, The “ILLEGAL” Tax, 11 U. CONN. PUB. INT. L.J. 93, 93 (2011) (noting that undocumented immigrant families even if legally present and working with U.S. citizen children do not qualify for the EITC, including families with active members of the armed services).
61. HOLT, AGE 30, supra note 33. See generally CHARITE, DUTTA-GUPTA & MARR, supra note 31 (describing many studies and papers on the EITC generating a wealth of information on the pervasive impact of the credit on working poor families and their communities).
“accessing” the EITC and its inherent tax justice. Before the essay describes specific EITC proposals, the inherent problems in accessing the EITC will be presented.

a. EITC Requires Complicated Tax Preparation and Filing for Millions of Taxpayers Who Might Not Otherwise Have a Filing Requirement

While the EITC is a critical benefit for low-income working families, because it is a social benefit delivered through the federal income tax system, it forces a significant number of taxpayers with no income tax filing obligations to file tax returns.63 Tax scholars have noted that in any given year more than 35% of American households, which include almost one-half of America’s children, have no income tax liability.64 In 2009, the Tax Policy Center estimated that 47% of taxpayers would owe no income tax. Among this group, the percentage of taxpayers estimated not to have a federal income tax liability varied widely by filing status and type of taxpayer and included 47% of single filers, compared with 38% of joint filers and 72% of heads of household and more than one-half of elderly taxpayers and taxpayers with children.65 Thus, because the EITC is structured as a federal income tax benefit rather than a direct subsidy program it adds significant income tax system and taxpayer compliance burdens. In addition to the burden of filing a tax return for tens of millions of taxpayers who would not otherwise have an income tax filing obligation, EITC beneficiaries are faced with meaningfully more complex tax compliance because of the EITC.66


64. Id.


Notably, these taxpayers may still need to file a return to claim a refund of overwithheld income taxes. The Urban Institute—Brookings Tax Policy Center estimated that 46% would not owe any federal income tax liabilities in 2011 and the Joint Committee on Taxation estimates that 51% of households paid no income tax in 2009. See MARR & HUANG, supra note 37, at 1. In more normal economic conditions, for example 2007, the percent has been 40%. Id.

b. EITC Shifts Significant Administrative Costs from Government to Taxpayers

The complexity of preparing and filing a tax return claiming the EITC transfers billions of dollars of low-income EITC benefits to tax preparers each year for tax preparation, filing, and related services. Moreover, an unintended consequence of delivering meaningful benefits through the tax system is that it results in vulnerable and financially unsophisticated individuals being forced to seek tax services for critical cash with which they can pay for these tax services and related products, whether they actually need or can otherwise afford them. These individuals are able to pay the relatively high and numerous fees associated with tax compliance, “audit protections,” and expedited refund delivery products because of the large tax refunds that force them to use these services. While some taxpayers may benefit from these ever increasing and evolving services, including expedited access to refunds, many of them do not. Most taxpayers could wait the short period of time to receive the money directly from the IRS at no cost. In addition, return preparers who market these products may have a financial incentive to artificially inflate refunds.

Because the EITC is a social benefit delivered through the tax system using complicated rules and numerous detailed requirements, EITC recipients must seek tax preparation and filing assistance. Over 70% of EITC recipients use paid preparers. Recent studies have estimated that as high as 73% of taxpayers claiming the EITC hire paid tax preparation.

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68. Id.
services to assist them in preparing and filing their returns. Free tax assistance programs like Volunteer Income Tax Assistance programs prepare less than 2% of EITC returns. Notably, EITC tax returns prepared by paid preparers are more likely to have EITC errors resulting in overpayments. An IRS compliance study for 1999 attributed approximately 70% of EITC overstatements to tax returns filed by paid preparers.

EITC recipients bear the direct costs of billions of dollars of “asset-stripping” compliance and unnecessary tax products—as well as, in too many cases, the extended financial and emotional costs of incompetent tax preparers. While the administrative costs for EITC recipients are high, EITC administrative costs for the government are low. Despite disproportionate examination efforts—37% of all audits and only 17% of all taxpayers—EITC government administrative costs are less than 1% of total program expenditures. These costs are far below comparable percentages (as high as 20%) for most low-income direct spending programs.

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76. See Nat’l Taxpayer Advocates, 2008 Annual Report to Congress 4 & n.12 (citing I.R.S. Compliance Data Warehouse, Individual Returns Transaction File (2006)).


78. Wancheck & Greenstein, supra note 25, at 9 (describing high audit rate despite lack of cost-benefit given the low amount of actual dollars collected and the percentage of EITC recipients to the overall pool of taxpayers); see also Holt, Age 30, supra note 33 (describing low government administration costs of EITC); Holt, Ten Years, supra note 74 (describing low government administrative costs for the EITC relative to other direct spending social benefit programs).

79. U.S. Gov’t Accountability Office, GAO-08-800R, Refund Anticipation Loans (2008) (letter to Subcommittee on Oversight Committee on Ways and Means House of
c. EITC Claimants Are More Likely to Be Subject to Collection Examinations Than Other Taxpayers and Extremely Likely to Be Unrepresented

IRS examinations are disproportionately focused on low-income taxpayers.80 As Professor Leslie Book recounts, as a result of the welfare to workfare push and integrating family and other low-income social benefits through the tax system “it perhaps was inevitable that the welfare system’s emphasis on weeding out the undeserving poor would become a major emphasis in the tax system.”81

Concern over ‘their’ cheating, and ensuring that the ineligible were not getting EITC benefits, surely fueled the Congressional mandate to the IRS to curtail the abuse within the EITC. If some eligible taxpayers were denied the EITC, then so be it, as Congress seems to consider it worse to have taxpayers who do not meet eligibility criteria receiving the EITC than eligible taxpayers not getting the EITC.82

The extreme complexity of the EITC causes unintentional errors.83 Government analysts have estimated that the number of EITC

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80. See generally Karie Davis-Nozemack, Unequal Burdens in EITC Compliance, 31 LAW & INEQ. 37 (2012). For data on the relative audit rate of EITC recipients, see NATIONAL TAXPAYER ADVOCATE, 2005 ANNUAL REPORT TO CONGRESS 102 tbl. 1.5.2 (2005) (2.25% audit rate for individuals claiming an EITC compared with an approximate 1.8% audit rate for individuals with income in excess of $100,000; non EITC-claiming lower-earning taxpayers had even lower audit rates); see also Leslie Book, Preventing the Hybrid from Backfiring: Delivery of Benefits to the Working Poor Through the Tax System, 2006 WIS. L. REV. 1103, 1106 (2006). As the New York Times reported, in 2001, for an EITC recipient, the odds of an audit were approximately 2%, while for all other individual taxpayers, the odds of audit were only three tenths of 1%. See David Cay Johnston, I.R.S. Audits of Working Poor Increase, N.Y. TIMES, Mar. 1, 2002, at C2; see also Leslie Book, The Poor and Tax Compliance, One Size Does Not Fit All, 51 KAN. L. REV. 1, 20 (2003) [hereinafter Book, One Size]. Illustrations of the importance of EITC examination coverage relative to other examination activities can be found at TREASURY INSPECTOR GEN. FOR TAX ADMIN. (TIGTA), TRENDS IN COMPLIANCE ACTIVITIES THROUGH FISCAL YEAR 2002, 2003-30-078 26–29 figs. 21–28 (2003). In fiscal years 1999, 2000, and 2001, there were approximately 600,000; 270,000; and 400,000 EITC correspondence audits, respectively. Id. at 21 fig. 21. TIGTA illustrates the decline in audit coverage for taxpayers with incomes over $100,000. Id. at 27 fig. 24; see also Johnston, supra.

81. Book, One Size, supra note 80.

82. Id.

83. “In sum, complexity of the EITC and the characteristics of low income taxpayers suggest that a significant portion of EITC noncompliance may relate to taxpayers unintentionally claiming an EITC that is erroneous in whole or in part.” Id. at 28; see Janet McCubbin, EITC Noncompliance: The Determinants of the Misreporting of Children, 53 NAT’L TAX J. 1135, 1158 (2000) (discussing how data suggests that some ineligible taxpayers intentionally respond to increases in the EITC, but noting that data also suggest that noncompliance is positively correlated
overstatements “fell by approximately 13 percent following implementation . . . of EITC simplification . . . in 2001.”84 While the IRS has the capability to verify income and age EITC requirements after it has processed third-party reporting data, EITC facts-and-circumstances eligibility requirements are not presently verifiable without auditing recipients. A 2010 study by the Taxpayer Advocate Service of 400 EITC cases noted that “[i]n 90 percent of the cases reviewed, the primary issue raised by the IRS involved either the Relationship Test or the Residency Test under the uniform definition of a ‘qualifying child.’”85 Low-income families, because of their life circumstances and lack of language skills, education, sophistication, time, and other resources, are particularly challenged to provide documentation that fits within the IRS’s narrow and rigid internal rules and training for acceptable documentation.86

Nearly 97% of EITC audits are undertaken with correspondence examinations87 and more than 98% of audited EITC recipients are unrepresented.88 Because EITC examinations are through the mail, effectiveness of this delivery method is paramount. Nevertheless, ten percent of all IRS correspondence is returned to the IRS.89

with lower levels of education, income, and wealth, and that less wealthy and less educated taxpayers are more likely to make unintentional errors); WANCHECK & GREENSTEIN, supra note 25; Improper Payments in the Administration of Refundable Tax Credits: Hearing Before the Subcomm. on Oversight, H. Comm. on Ways and Means, 112 Cong. 10–14 (2011) (statement of Nina E. Olson, National Taxpayer Advocate) [hereinafter Statement of Nina E. Olson] (noting the many challenges low income families face generally and specifically when trying to prove residency and relationship eligibility).

84. WANCHECK & GREENSTEIN, supra note 25.

85. See NAT’L TAXPAYER ADVOCATE, FISCAL YEAR 2012 OBJECTIVES REPORT TO CONGRESS app. VIII, VIII-3 (discussing the Taxpayer Advocate Service EITC case review).

86. Statement of Nina E. Olson, supra note 83.

87. See I.R.S., 2010 DATA BOOK tbl 9a; see also Nina E. Olson, IRS Correspondence Examinations: Are They Really as Effective as the IRS Thinks?, NAT’L TAXPAYER ADVOCATE, http://www.taxpayeradvocate.irs.gov/Blog/irs-correspondence-examinations-are-they-really-as-effective-as-the-irs-thinks (last visited Feb. 8, 2013) [hereinafter Olson, Correspondence Examinations].

88. “While sophisticated taxpayers with representation can navigate correspondence examinations with minimal difficulty, in EITC examinations, ninety-eight percent of taxpayers are unrepresented.” Davis-Nozemack, supra note 80, at 39 (citing NAT’L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS vol. II, at 102 (2007) (“[T]he findings are based on a dataset containing 427,807 taxpayers. Of these returns only 7,688 (1.8%) were represented in the original audit.”)).

is likely higher for EITC recipients who disproportionately suffer housing issues and as a consequence are more transitory.\textsuperscript{90} Obviously, if a taxpayer does not receive correspondence, she will not respond to it.\textsuperscript{91}

Even for sophisticated taxpayers, who are much more likely to be represented by tax professionals, IRS correspondence is intimidating, inaccessible, and confusing. Not surprisingly, low-income taxpayers—who are more likely to have language barriers, basic literacy as well as financial literacy challenges, and are much more likely to be transitory and working irregular hours—are challenged to respond to IRS correspondence.\textsuperscript{92} In a study of EITC taxpayers, more than 70\% stated that IRS examination correspondence was difficult to understand.\textsuperscript{93} As a result, the response rate to EITC correspondence examinations is a low 30\%.\textsuperscript{94} Alternatively, when EITC examinations are conducted face-to-face, the IRS has achieved an 85\% response rate.\textsuperscript{95} Notably, the 43\% of taxpayers who sought reconsideration of unfavorable EITC examinations and were successful received, on average, 96\% of the amount of EITC claimed on their original filing.\textsuperscript{96}

Unscrupulous tax preparers and other perpetrators of fraud focus on tax

\textsuperscript{90} Why Are People Homeless?, NAT’L COALITION FOR THE HOMELESS (Jul. 2009), http://www.nationalhomeless.org/factsheets/why.html (noting the inextricable link between poverty and homelessness).

\textsuperscript{91} For a discussion of less obvious IRS-taxpayer communication problems see NATIONAL TAXPAYER ADVOCATE, 2008 ANNUAL REPORT TO CONGRESS 227, 230 (noting that more than 50\% of the taxpayers audited by correspondence did not respond to IRS’s letters, and that 26.5\% of the respondents to a TAS survey were not even aware the IRS was auditing their returns); NATIONAL TAXPAYER ADVOCATE, 2011 ANNUAL REPORT TO CONGRESS vol. 2 (discussing the potential confusion generated by various IRS letters).

\textsuperscript{92} See Leslie Book, The IRS’s EITC Compliance Regime: Taxpayers Caught in the Net, 81 OR. L. REV. 351, 396 (2002) (discussing literacy issues with low-income taxpayers); Lipman, Working Poor, supra note 67, at 471 (“literacy limitations are sharply higher among low-income adults.”) (citing Jeffrey S. Gold, Proposed IRS Consortium Deal for Return Pep and e-Filing is Flawed, 96 TAX NOTES 1645 (2002)); see also NAT’L TAXPAYER ADVOCATE, FISCAL YEAR 2006 OBJECTIVES REPORT TO CONGRESS 34–35 (2007) (“Financial literacy plays an important role in tax compliance because taxpayers who do not understand basic financial transactions are unlikely to understand the difference between employee and independent contractor status or the EITC’s complex eligibility rules.”).

\textsuperscript{93} See NAT’L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS 104 (2007) (stating 42.7\% of the study participants “did not understand some words/terms”).

\textsuperscript{94} Olson, Correspondence Examinations, supra note 87 (describing many barriers to correspondence audits—including, among many factors, 10\% rate of returned mail).

\textsuperscript{95} NAT’L TAXPAYER ADVOCATE, 2011 REPORT TO CONGRESS: MOST SERIOUS PROBLEM: THE IRS NEEDS TO REEVALUATE EARNED INCOME TAX CREDIT MEASURES AND TAKE STEPS TO IMPROVE BOTH SERVICE AND COMPLIANCE (2011).

\textsuperscript{96} NAT’L TAXPAYER ADVOCATE, 2004 ANNUAL REPORT TO CONGRESS: EARNED INCOME TAX CREDIT RECONSIDERATION STUDY, at 1 (2004). A random sample of EITC audit reconsideration cases closed in 2002 and 2003 found that nearly 80\% had resulted from difficulties in IRS documentation requirements or communication challenges. See id. In 43\% of the cases, the reconsideration review found that the taxpayer was entitled to virtually all the EITC originally claimed. See id.
provisions with large dollar payouts. The magnitude of the tax benefit and the relative ease for securing it seem to be significant factors for targets of fraud. The refundable component of a tax benefit provides a refund for tax dollars never actually paid into the system. But, the refundability component of a tax benefit is not necessarily a main driver of substantial noncompliance. Nonrefundable tax credits and other expenditures are also subject to noncompliance, including fraudulent and abusive schemes.

EITC error rates are in the low to high 20% range and the EITC has been identified as an “improper payment” under applicable law. The National Taxpayer Advocate, among others, has analyzed and criticized these amounts and rates as overestimating actual errors. Whatever the actual error rate is, it should be considered in the context of federal income tax administration. In this context, the error rates are lower than in other areas of the income tax system. For example, studies estimate that cash basis self-employed persons report only 11% to 19% of their income, and that all self-employed taxpayers underreport income by 57%, representing

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97. During calendar year 2009, the IRS’s Questionable Refund Program identified about 280,000 false and fraudulent returns claiming refunds of about $1.9 billion. Of that total, the IRS disallowed about 192,000 returns, preventing the payment of about $1.4 billion in improper claims. Most of the $500 million balance of identified false and fraudulent claims was paid out before the IRS could act. The IRS reports that the vast majority of false and fraudulent refund claims involve income and withholding amounts ordinarily reported on Form W-2. Nat’l Taxpayer Advocate, 2009 Annual Report to Congress: Running Social Programs Through the Tax System vol. 2, at 88 fn. 22 (2009); Nat’l Taxpayer Advocate, 2009 Annual Report to Congress 82 n.22 (I.R.S. Response to TAS Information Request (Dec. 16 2009)); id. (I.R.S. Examination Operational Automation Database (EOAD), Compliance Data Warehouse (CDW) FY 2009).


99. Wanchek & Greenstein, supra note 25.

100. See U.S. Gov’t Accountability Office, GAO-09-628T, Improper Payments: Progress Made But Challenges Remain in Estimating and Reducing Improper Payments app. 1, at 20 (2009) (setting forth EITC as an improper payment under law). See generally Davis-Nozemack, supra note 80 (describing additional administrative process, scrutiny, and burdens on EITC because it has been alleged to be a tax expenditure with substantial improper payments under federal law).

101. The net misreporting percentage for nonfarm proprietor income is 57.1%, as compared to 26.3% for credits. Holt, Age 30, supra note 33 (noting that “[o]verall, it remains unknown how many EITC errors stem from misunderstanding or misinterpretation of rules versus negligence or fraud (GAO 2002)’’); see also Statement of Nina E. Olson, supra note 83, at 6–7, 14–19.

more than 27% of the most recent estimates of the tax gap. Of the individual underreporting gap in 2006 (totaling approximately $235 billion), less than 12% ($28 billion) came from overstated tax credits. The General Accounting Office reported less than $17 billion in improper EITC payments in 2010. Given the relatively low return on the audit costs, the Office of Management and Budget has said that allocating greater importance to reducing EITC errors is a poor allocation of limited resources and disregards significant shortfalls in other areas of tax collection.

Yet, taxpayers who claim the EITC are significantly more likely to be audited than other individual taxpayers and extremely unlikely to be unrepresented by counsel. Congress appropriated almost $1 billion over a seven-year period, a period of steep declines in IRS enforcement and compliance, specifically for IRS EITC compliance initiatives. In 2002,

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104. Statement of Nina E. Olson, supra note 83, at 3 n.13.

105. See U.S. Gov’t Accountability Office, GAO-11-575T, Improper Payments: Recent Efforts to Address Improper Payments and Remaining Challenges (2011); see also Statement of Nina E. Olson, supra note 83, at 14–16 (describing uncertain statistical basis because they are based upon prior IRS studies that determined EITC was not valid when taxpayers merely failed to document their claims).

106. U.S. Gov’t Accountability Office, GAO-13-151, Tax Gap: IRS Could Significantly Increase Revenues by Better Targeting Enforcement Resources (2012) (recommending that IRS allocate funds away from low tax revenue raising EITC audits to higher income tax return audits which generate meaningfully more revenue); see also Statement of Nina E. Olson, supra note 83, at 6–7 (charting evidence to demonstrate that EITC audits constitute about a third of all audits, yet yield only about one-third as much tax per exam).

107. The audit rate for EITC returns is approximately twice the rate at which the IRS audits individual taxpayers. See I.R.S., 2010 Data Book 22 tbl. 9a (585,202 of 24,502,550 EITC returns, and 277,945 of 15,472,712 non-farm business individual returns); see also I.R.S., 2008 Data Book tbl. 9a (showing an average audit rate of slightly more than 2% for taxpayers claiming the EITC as opposed to about 1% for taxpayers overall). In fiscal year 2008, the audit rate for individual returns was approximately 0.7%, while the audit rate for EITC returns was approximately 2.1%, approximately triple the rate for returns that did not claim the EITC. David Cay Johnston, Affluent Avoid Scrutiny on Taxes Even as I.R.S. Warns of Cheating, N.Y. TIMES, Apr. 7, 2002, at A1; see also Anne L. Alstott, The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform, 108 HARV. L. REV. 533, 589 (1995) (noting political reaction to error rates makes it improbable that there will be acceptance of high EITC error rates).

108. Ninety-eight percent of audited EITC recipients are unrepresented. See Nat’l Taxpayer Advocate, 2007 Annual Report to Congress vol. 2, at 102 (2009) (determining that “the findings are based on a dataset containing 427,807 taxpayers. Of these returns only 7,688 (1.8 percent) were represented in the original audit.”); Statement of Nina E. Olson, supra note 83, at 17–19 (stating that audited EITC recipients who were represented were almost twice as likely to be found eligible for the EITC).

approximately 83% of IRS compliance examination resources were focused on the EITC. 110 In 2010, EITC tax returns, which account for only 17% of all individual tax returns, accounted for approximately 37% of all individual taxpayer audits. 111 These examinations do not appear to be a good allocation of limited government resources because they do not generate meaningful tax revenue. While less than one-quarter as many examinations were conducted of tax returns with income from $200,000 to $1 million, those examinations generated more tax revenue than examinations of EITC filers. 112

Because the IRS is a revenue collection agency, taxpayer correspondence, examinations, and audits are designed on a traditional collection agency model using traditional enforcement agency approaches, structure, and culture. Consistent with its original collection design and mission, IRS employees embrace a collection mentality and audit returns many months, even years after refunds have been distributed and spent. 113 If later denied, tax deficiencies grow over time with interest and penalties. 114 When the IRS detects errors, whether due to tax preparer inadvertence or not, “it is the taxpayer who is the one left holding the bag in terms of money due, time and stress expended, and potential loss of benefits in future


110. HOLT, AGE 30, supra note 33.


112. Nat’l Taxpayer Advocate, 2010 Data Book 22 tbl. 9a; see also WANCHECK & GREENSTEIN, supra note 25, at 1.


114. See, e.g., Baker v. Comm’r, T.C.M. (CCH) 949 (2006) (entering assessment of $3,556); Diaz v. Comm’r, T.C.M. 1420 (2004) (entering assessment of $5,179); see also SALTMAN, TAX PROCEDURE at § 6.02 (“On assessment, the taxpayer will be sent a notice of the assessment of the tax and accrued interest”. If the taxpayer fails or refuses to pay the assessment, the Service will take enforced collection action, such as a levy, against the taxpayer to collect tax, including interest.”).
years.”115 Low-income taxpayers are extremely unlikely to have the resources to pay their tax deficiencies, plus applicable interest and penalties, due to EITC overpayments.116 As a result, they often find themselves subject to IRS automatic collection procedures. IRS automatic collection procedures require that a Notice of Federal Tax Lien be filed whenever a taxpayer with a debt of $5,000 or more is placed in currently not collectible status.117 This notice can damage an individual’s credit rating and negatively impact borrowing, employment, education, and housing opportunities.118 The IRS generally will offset future tax refunds with any deficiencies owed, irrespective of any needs-based factors.119

Taxpayers who fraudulently claim the EITC cannot receive EITC benefits for ten years.120 EITC claims that are made recklessly or with intentional disregard of the rules result in a two-year ban.121 Other tax penalties pale in comparison to EITC penalties; no other tax provision is similarly limited.122 “There are no analogous sanctions applicable to other improper positions taken on federal income tax returns.”123 Penalties for fraudulent, reckless, or intentionally improper EITC claims are more severe than penalties for fraud in any other tax and social-benefit programs.124

d. EITC Benefits Are Paid in a Lump Sum Annually Up to a Year After the Related Earnings

Congress wants the EITC to help motivate low-income individuals to

116. If EITC benefits are disallowed, any overpayment is likely several thousands of dollars given that the average family EITC was more than $2,800 in 2012. Taxpayers who are unable to immediately repay their entire liability can negotiate with the IRS for various alternatives. See Bryan T. Camp, The Failure of Adversarial Process in the Administrative State, 84 IND. L.J. 57, 65 (2009).
117. IRM 5.19.4.5.2(3) (Apr. 26, 2006).
122. See Zelenak, supra note 28, at 1894.
123. Id.
124. Id. at 1893–95 (comparing EITC sanctions with those under TANF and food stamps and concluding that “[a]rguably, the EITC sanctions are even more severe . . .”).
seek work to lift them and their families out of poverty.\textsuperscript{125} To best achieve this goal, the incentive payments should be tied as directly as possible to the desired actions. However, because the EITC is run through the federal income tax system, rather than as a direct benefit structured as a wage subsidy or a payroll tax offset, taxpayers must wait for the next calendar year to receive their current year incentives. As tax expenditures, EITC benefits are delayed until claimed, distributed, and received as tax refunds on the next annual income tax return. As a result, the current year EITC is tied to an individual’s prior year annual earned income, which may lead to inefficiencies given that employment and living arrangements change frequently for low-income families. Indeed, because of the annual measurement for earned income, a recent analysis indicated (not surprisingly) that EITC benefits are often received due to some unemployment during the year, which resulted in a lower annual earned income amount.\textsuperscript{126}

Because the working poor by definition suffer extreme liquidity issues, they are anxious to receive these monies as soon as possible. As a result of persistent cash needs and lack of banking or credit access, these taxpayers often incur substantial commercial fees associated with turning their refunds into cash as quickly as possible.\textsuperscript{127} In addition, the “lump sum” rather than the monthly subsidy nature of the EITC may require costly consumption smoothing throughout the year. While Congress had provided an Advanced EITC payment system to mitigate this issue, it terminated the program in 2011 due to low use and perceived abuse.\textsuperscript{128}

As these four challenges inherent in the EITC design, distribution, and enforcement structure evince, low-income working families face meaningful


\textsuperscript{126} Casey B. Mulligan, Earned-Income Ironies, N.Y. Times (Feb. 6, 2013, 6:00 AM), http://economix.blogs.nytimes.com/2013/02/6/earned-income-ironies/.

\textsuperscript{127} U.S. Gov’t Accountability Office, GAO-08-800R, Refund Anticipation Loans (2008); see also U.S. Gov’t Accountability Office, GAO-07-1110, Advance Earned Income Tax Credit: Low Use and Small Dollars Paid Impede IRS’s Efforts to Reduce High Noncompliance (2007).

\textsuperscript{128} See The Education, Jobs and Medicaid Assistance Act, Pub. L. No. 111-226, 124 Stat. 2389, 2403 (2010) (repealing I.R.C § 3507, was signed into law by President Obama in August 2010). The Advance Earned Income Tax Credit (AEITC) program was terminated effective for all tax years beginning after December 31, 2010. Research suggested that the program was not utilized, with only 3% of eligible employees taking advantage of the advance program, and 20% of claimants had invalid social security numbers.
costs and burdens that undermine Congress’s intended antipoverty benefits. The next section of this essay describes specific proposals to mitigate these challenges and empower rather than undermine EITC beneficiaries, many whom are poor children, and enhance rather than inhibit exponential antipoverty benefits.

III. PROPOSALS FOR PROVIDING ACCESS TO JUSTICE UNDER THE INTERNAL REVENUE CODE

“If a free society cannot help the many who are poor, it cannot save the few who are rich.” 129

John F. Kennedy

A. Primum Non Nocere (First, Do No Harm)

The evidence and injustice of poverty in America today is shocking. Nevertheless, without existing state and federal antipoverty relief, the suffering, indignity, and hopelessness would be much worse. 130 Government has, does, and must continue to play a major role in reducing and preventing poverty. 131

The greatest antipoverty programs in America today are Social Security and the EITC. Recent Census data demonstrates that Social Security Administration payments alone lifted 21.4 million Americans, including 1.1 million children, out of poverty in 2011. 132 Without Social Security benefits, almost 44% of elderly Americans would have incomes below poverty; with Social Security benefits, only 8.7% of American elders live in poverty. 133 While Social Security’s antipoverty relief is targeted to elders, the EITC benefits more poor children than any other government program.

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130. RON HASKINS, BROOKINGS INST., COMBATING POVERTY: UNDERSTANDING NEW CHALLENGES FOR FAMILIES, TESTIMONY TO UNITED STATES COMMITTEE ON FINANCE fig. 3 (June 5, 2012) (demonstrating that increased work and government work support, including the EITC, decreased poverty rates by more than 34% in 2006); see also Robert Greenstein, Letter to the Editor, Invitation to a Dialogue: Fighting Poverty, N.Y. TIMES (Feb. 5, 2013), http://www.nytimes.com/2013/02/06/opinion/invitation-to-a-dialogue-fighting-poverty.html (stating that “safety-net programs now cut the number of poor people nearly in half—by more than 40 million”).
131. See HASKINS, COMBATING POVERTY, supra note 130.
The EITC raised 5.7 million people out of poverty, including 3.1 million children, and the Supplemental Nutrition Assistance Program (SNAP or food stamps) lifted almost four million people, including 1.7 million children, in 2011. The Affordable Care Act also helped to mitigate poverty. The Census report recounts that the number of uninsured Americans fell by 1.4 million in 2011, due primarily to the extension of health insurance coverage to young adults.

At a minimum, Americans and their representatives in government should ensure that these programs are maintained, staffed, and supported. These antipoverty programs should not be reduced, but must be maintained at the same or higher, more effective levels. The good news is that the American Taxpayer Relief Act of 2012 maintained and extended through 2017 certain antipoverty benefits of the EITC and the Child Tax Credit. In 2011, these additional benefits, which were scheduled to expire at the end of 2012, lifted 1.5 million Americans in low-income working families, including 800,000 children, out of poverty and lessened the severity of poverty for 15.2 million more individuals, including 7.1 million children. The bad news is that these working poor family tax benefits were not made permanent, like generous estate tax exemptions for extremely high net worth individuals. Moreover, the 2012 payroll tax holiday was not extended, so the working poor will suffer a 2% payroll tax rate increase on every dollar of earned income as of January 1, 2013.

As members of Congress continue to debate government borrowing, spending, and other economic and tax policies, antipoverty provisions in and

135. Id.
138. Id.
outside of our tax system must be preserved. At a minimum, we must be vigilant to ensure that the hard fought battles for improving benefits in the almost forty-year-old EITC are preserved and continue to be economically beneficial for America. As such, almost fifty years after President Johnson declared a war on poverty, under the brilliant leadership of Sargent Shriver, we need to appoint and support committed leadership to better manage Congress’s enactment of meaningful social benefits, including the EITC, as well as health care administration and economic stimulus incentives, through the income tax system. Without adequate leadership (and funding of the same) the current IRS administration is not as effective as it could be at achieving Congressional goals and will have to continue to divert its limited resources from its core function of tax collection. Given America’s already limited resources, we cannot afford to turn any resources away from collecting revenues or ensuring social justice.

B. IRS Commitment to, and Leadership in, Social Justice Policies and Programs

Consistent with the National Taxpayer Advocate’s 2010 recommendation to Congress, the IRS should appoint a newly created deputy commissioner with primary responsibility to create policy and develop strategic direction and administration for all tax-system based social benefit initiatives.

The commissioner and her staff would gain experience in implementing social programs, and as a centralized source of stored institutional knowledge, it would be invaluable in developing future programs. By retaining valuable information from experiences and organizing it into an easily accessible format, the IRS could anticipate problems and plan accordingly. Such stored institutional knowledge could effectively address issues such as timing of

140. War on Poverty, SARGENT SHRIVER, http://www.sargentshriver.org/articles/war-on-poverty (last visited 21, 2013) (“On February 1, 1964—barely two months after the assassination of President Kennedy, and the morning after returning from a grueling, three-week trip to Asia as Director of the Peace Corps—Sargent Shriver received a phone call at home from President Lyndon Johnson. The President informed him that, at a press conference that afternoon, he would be announcing Shriver’s appointment as the Director of the War on Poverty.”).

141. NAT’L TAXPAYER ADVOCATE, 2011 ANNUAL REPORT TO CONGRESS vol. 1, at 3 (describing how the “IRS Is Not Adequately Funded to Serve Taxpayers and Collect Taxes” and noting that despite significantly increased obligations IRS funding has been dramatically decreased and it is meaningfully underfunded).

payments, third-party information reporting, verification of eligibility for benefits, fraudulent payments, communication strategies, and online tools to help taxpayers determine eligibility. With well-developed institutional knowledge, the IRS would be better positioned for meaningful consultations with congressional offices or committees on the strengths and weaknesses inherent in running social programs through the tax system. Accordingly, the IRS could recommend that Congress design statutory provisions to avoid some of the proven shortcomings of Code-based programs to maximize the effective and efficient delivery of benefits. 143

Not surprisingly, many of the issues that the Social Benefits Deputy Commissioner (SBC) would address are issues that have been discussed above as continuing problems with access to EITC benefits. For example, “timing of benefit payments” is an issue in the annual lump sum design of EITC benefit distributions. The SBC could, among other alternatives such as including fundamental restructuring of the EITC as a direct spending program, study the recently terminated Advanced EITC provision to better understand why it was ineffective and allegedly subject to abuse. Most financial planners and economists would agree that if EITC benefits could be paid out to working taxpayers with each paycheck, this would both remedy costly cash flow issues and excessive tax compliance burdens as well as mitigating EITC overstatements, as fewer individuals would be receiving large dollar refunds with their annual tax filings—or, if a direct spending program, might not have to file. Taxpayer costs and demand for fast refund delivery products would be reduced, and, therefore, net EITC benefits for working poor families would be increased. Obviously, this is one example of the significant activities that an SBC could engage in for the betterment of social benefits design, implementation, delivery, maintenance, costs, effectiveness, and follow-up evaluations.

A better understanding of, and strategies to address, EITC issues related to “verification of eligibility for benefits, fraudulent payments, and communication strategies” 144 could better equip the government to more efficiently deliver EITC benefits to eligible taxpayers. If properly designed, tested, and implemented, this goal might be achieved at a lower aggregate cost and a higher participation rate.

The IRS is presently working on at least two initiatives to facilitate

143. Id. at 23.
144. Id. at 23.
achieving these goals. Additionally, as the IRS continues to move in the direction of automation and computerization, EITC compliance burdens should be reduced. The IRS’s current investigation of more accessible and real time third-party reporting and free online tax preparation (e.g., pre-populated tax returns) and other more streamlined tax preparation and filing alternatives should benefit EITC beneficiaries with reduced compliance burdens. Moreover, the SBC might revisit the terminated TeleFile system to determine if it might provide a non-computer-based alternative for low-income and rural area taxpayers who more often do not have access to computers or the internet.

In addition, moving in the direction of verifying refunds before distribution in a timely manner with adequate taxpayer protections could meaningfully reduce audit burdens for EITC beneficiaries. With the recent decrease in refund anticipation loans and the U.S. Treasury Department’s pilot debit card project, the IRS should continue to explore free refund acceleration alternatives for low-income taxpayers who are often unbanked or underbanked. These alternatives should increase net EITC benefits for working poor families.

145. Davis-Nozemack, supra note 80, at 72–75 (describing a partnership with TAS developing and implementing enhanced EITC correspondence audits; an expansion of the list of qualifying documentation to verify EITC eligibility; as well as, a pilot program using SNAP and TANF state files to verify EITC eligibility). While these initiatives are not without problems, they indicate an acknowledgement that the status quo is not satisfactory and movement toward more targeted accommodations. Id.


I also see technology as one of the keys for unlocking a potential new tax structure that could fundamentally change the way taxpayers and tax practitioners prepare and file individual returns. It would deal in real time and avoid audits that may take place three years after a return is filed. In this long-term vision, the IRS could get all information from third parties before individual taxpayers filed their returns. Taxpayers or their return preparers could then access that information, via the Web, to prepare their tax returns. Taxpayers or their return preparers could then add any self-reported and supplemental information to the returns, and file it with the IRS. The IRS could embed this third-party information into its pre-screening filters, and could ask the taxpayer to fix the return before accepting it if it contains data that does not match the taxpayer’s records. This is a real game-changer as it could help ensure more accurate returns and far less of the troublesome back-end auditing.

Id. at 289.


148. See Chi Chi Wu, supra note 69 (noting that while 2012 will likely be the last year high cost/rate refund anticipation loans).

149. During the 2011 filing season, the Treasury Department made available prepaid debit cards for tax refunds for up to 800,000 unbanked taxpayers. Nat’l Taxpayer Advocate, 2012 Annual
Finally, the SBC should work with its stakeholders to ensure the success of the IRS’s long overdue program regulating paid tax return preparers. Leadership on this issue is particularly critical to ensure implementation of this recently jeopardized program. On January 18, 2013, the District Court for the District of Columbia issued an unexpected decision in Loving v. IRS, holding that the IRS lacked authority to regulate paid tax return preparers and permanently enjoined the IRS from enforcing recently enacted Treasury Regulations. The Treasury Regulations at issue require preparer registration, testing, and continuing education, with a focus on EITC eligibility. If implemented, all return preparers will be subject to the ethical rules of Circular 230, which provides IRS disciplinary procedures to address misconduct. The program includes a requirement for preparers to provide a unique preparer tax identification number and file a due diligence checklist with EITC returns. The program could significantly reduce EITC errors (and even fraud). The SBC should be involved as a stakeholder with the program to ensure that it is implemented and effectively administered to better achieve social benefits program goals.

C. Achieving Rather Than Undermining Social Benefit Policy Goals

1. Designing, Developing, and Inculcating a Social Benefits Administration Culture

The SBC would be primarily responsible for moving the IRS in a direction to better achieve its clear congressional mandate of social benefits


152. Id.


administrator. As the National Taxpayer Advocate has noted in the 2010 study of the administration of tax-based social benefits programs:

There are significant differences between benefits agencies and enforcement agencies in terms of culture, mindset, and the skills sets and training of their employees. The current IRS workforce generally lacks the social welfare or caseworker background necessary to interact with taxpayers on social benefit issues. This lack of experience is particularly relevant where IRS employees interact with members of special populations, such as low income, English as a Second Language (ESL), Limited English Proficiency (LEP), disabled, and elderly taxpayers.

Therefore, the SBC will have to work with its staff to develop new training programs to work with select IRS personnel to begin to inculcate a social benefits approach and culture with respect to tax administration of social benefits programs.

2. Coordination and Outreach to Social Benefits Administrator Partners

Organizational change takes a village. Fortunately, there are already many partners and stakeholders, inside and outside of the IRS and Congress, who work tirelessly to better achieve the goals of America’s social benefits programs. These partners and stakeholders and the volumes of research and work they have produced will be vital resources for the SBC and her staff.

Congress has provided for several tax-system-based social benefit administrator partners for the SBC through its provision of general taxpayer advocacy, low-income taxpayer representation, and tax return preparation assistance. The SBC should work with these stakeholders and partners to better understand and serve its social benefits program constituents. These partners include the staff at the Office of Taxpayer Advocacy, clinicians

157. Id. at 16, 22.
159. Congress created the Taxpayer Advocate Service “to help individual and business taxpayers resolve problems that have not been resolved through normal IRS channels. . . . [a]nd address[es] large-scale, systemic issues that affect groups of taxpayers.” TAS History, Nat’l Taxpayer Advocate, http://www.taxpayeradvocate.irs.gov/About-TAS/History (last visited Feb. 23, 2012). The organization began in 1979 as the Office of the Taxpayer Ombudsman “to serve as the primary advocate within the IRS for taxpayers” and was “codified in the Taxpayer Bill of Rights.” Id. The Taxpayer Ombudsman and the Assistant Commissioner were given a mandate to provide an annual
and volunteers at Low Income Taxpayer Clinics, and organizers and organizations involved with Volunteer Income Tax Assistance and Tax Counseling for the Elderly.

In addition, the SBC should reach out to and work with leadership in the broader tax professional community. The American Bar Association—Section of Taxation has made an affirmative and sustained commitment to low-income taxpayers by supporting LITCs with outreach, community-

report to Congress “about the quality of taxpayer services provided by the IRS.” Id. (citation omitted). In 1996, Congress replaced the Office of the Taxpayer Ombudsman with the Office of the Taxpayer Advocate, with the duties: “to assist taxpayers in resolving problems with the IRS;” “[t]o identify areas in which taxpayers have problems in dealings with the IRS;” “[t]o the extent possible, propose changes in the administrative practices of the IRS to mitigate those identified problems;” and “to identify potential legislative changes which may be appropriate to mitigate such problems.” Id. (citation omitted). Finally, in 1996, Congress rechristened the Taxpayer Advocate as the National Taxpayer Advocate. Id. (citation omitted). Local Taxpayer Advocates are located in each state, and report directly to the NTA. See generally NAT’L TAXPAYER ADVOCATE, www.taxpayeradvocate.irs.gov (last visited Jan. 14, 2013).


building, educational programs, and pro bono tax matters. The Section has a full-time staff member dedicated to nationwide coordination of pro bono tax services, including among several key projects focusing on tax court calendar calls, which try to mitigate challenges facing the 70% of Tax Court litigants who are unrepresented, and VITA programs. Scholars in nonprofit think tanks, including the Center on Budget and Policy Priorities, Brookings Institution, Urban Institute, Economic Policy Institute, Joint Center for Policy Research, and in the academy have produced more than 150 studies and countless papers on the EITC, including many comprehensive suggestions for reform found in the footnotes to this article.

162. Low Income Taxpayer Clinics, ABA SECTION OF TAXATION, http://www.americanbar.org/groups/taxation/tax_pro_bono/Low_Income_Taxpayer_Clinics.html (last visited Feb. 25, 2013). The Section regularly provides educational programs, publications, and training programs focusing on low-income taxpayer matters. The Section has committed to providing access to these programs by offering several scholarships for each of three meetings every year.


167. Holt, Age 30, supra note 33.
Most notably, the unparalleled pinnacle of thoughtful, thorough, and in-depth research on a multitude and myriad of issues related to social benefits programs in the income tax system comes from the IRS’ Office of the Taxpayer Advocate Service. The online, user-friendly, easily accessed and electronically searchable annual reports to Congress include numerous detailed problem explanations, analysis, history, recommendations, reasoning, references, responses, and follow-ups in more than ten-thousand pages. These reports, together with many thorough and detailed studies, will be a priceless historical and future resource for the SBC and her staff.168 Nina Olson and her team of thousands of local advocates and other staff across America will be a resource beyond compare for the SBC through these annual reports as well as readily accessible statements to Congress and other detailed related reports.169

IV. CONCLUSIONS

“Human progress is neither automatic nor inevitable . . . Every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals.”

Dr. Martin Luther King, Jr.170

America in 2013 faces many challenges. Among the most unconscionable and deeply troubling issues today are unprecedented income inequality and the related and resulting poverty. More people in America are living in poverty than ever before in our history. And the poor in America are disproportionately tens of millions of the youngest of our children. While not in center stage, the problem of childhood poverty exposes a heart-wrenching and far-reaching injustice. We must reinvigorate

169. Id. (providing a wealth of resources for facilitating effective social benefits through the federal income tax system).
170. 8th Annual Martin Luther King, Jr. Celebration Week, N.Y. Univ., http://www.nyu.edu/life/events-traditions/mlk-week.html (last visited Apr. 4, 2013) (“On February 10, 1961, the 32-year old Reverend Dr. Martin Luther King, Jr. delivered a speech on the campus of New York University. Dr. King’s speech entitled, ‘The Future of Integration,’ advocated for civil rights and nonviolent protest for social change.”)
our commitment to economic justice in America, and, indeed, the war on poverty.

Fortunately, we have many tools for justice in our war chest. For example, the Social Security Administration and its distributed benefits have achieved unprecedented success in battling elder poverty. The tool for battling childhood poverty today is the EITC. At almost forty years old, the EITC is more effective today after much attention, research, restructuring, and support through hands-on social justice advocates. There is a treasure chest full of thoughtful research, recommendations, and detailed proposals to enhance the EITC’s antipoverty goal.

Nevertheless, the EITC suffers from a fundamental disconnect. The EITC is a social benefit program distributed through the federal income tax system. While this structure has certain benefits, including low government administration costs with high participation rates the IRS is fundamentally a collection agency. As such, its design, focus, culture, training, and indoctrination are to collect revenue rather than distribute resources. Not surprisingly, a tragically underfunded IRS is challenged to balance collection goals with distribution strategies. Accordingly, it is time for Congress to address the missing pieces in its increasing charge to the IRS to distribute social benefits. The missing pieces include a SBC. Fortunately, much of the foundation for the SBC and her staff has been laid as the IRS has struggled with its duplicitous roles. The SBC will join an impressive team of social justice advocates across America, inside and outside of the government, to better provide access to tax justice for all Americans, including through the income tax system to the most vulnerable and voiceless among us.